

INITIAL STATEMENT OF REASONS:

The California Prison Industry Board (PIB) proposes to add Section 8904 of Article 3, Chapter 1, of the California Code of Regulations (CCR), Title 15, Division 8.5, concerning incentive compensation. Specifically, the PIB proposes adding Section 8904 to provide notice of and affirm the PIB's authority to provide incentive compensation.

PURPOSE OF PROPOSED REGULATORY ACTION:

In order to implement and make more specific Penal Code sections 2808 and 2809 the PIB proposes to adopt a new regulation concerning staff recruitment and retention. Penal Code (PC) 2801 and 2808 provide the PIB with implied rulemaking authority to establish regulations for developing and operating enterprises to employ prisoners. Penal Code Section 2801(c) provides CALPIA's General Manager with the authority to operate a work program for prisoners. Penal Code Section 2809 provides that the PIB may: *"recruit and employ civilian staff. . . and shall establish . . . hiring. . . procedures and practices which will meet the unique personnel needs of the authority. The practices may include incentives based on productivity, profit-sharing plans, or other criteria which will encourage civilian employee involvement in the productivity goals of the authority."*

Pursuant to Government Code section 11342.2, this proposed amendment is consistent with, and not in conflict with, PC sections 2801, 2808 and 2809; the proposed regulatory action is reasonably necessary to effectuate the purpose of PC section 2801 and add the regulation to provide notice of and affirm the PIB's authority to recruit and retain staff.

Problem Addressed by Adding Regulation

CALPIA proposes to add section 8904 to Title 15, Division 8.5, titled Incentive Compensation Authority, to expressly notice and affirm the authority of the Prison Industry Board (PIB) to authorize recruitment incentives and ongoing compensation differential incentives. CALPIA is currently in the process of recruiting a General Manager upon the retirement of the current General Manager in January 2019. In addition, in various other positions, CALPIA has vacancies that are continuing to rise and require competitiveness to recruit and retain staff. For example, CALPIA has position authority for a total of 446 positions in the Custodian (CF) series. Since 2015, there has been more than a 400% increase in positions for this classification. This number of personnel will continue to increase as the Health Care Facilities Improvement Projects (HCFIP) continues to complete new construction of medical space and buildings statewide. With the projected increase in square footage, a 38% vacancy rate for the CF series is anticipated.

CALPIA Custodians encounter situations and incidents not typical for custodial staff with Department of General Services (DGS) further exacerbating recruitment efforts. CALPIA Custodians are subject to ongoing challenges and extremely difficult working conditions with regard to the working environments associated with a health care and mental health

facility. These difficulties are further exacerbated by the circumstances associated with the operations and stressful conditions of a correctional setting to include, offender violence, sexual predatory behaviors, overfamiliarity, restricted movement, and supervision of offenders. Typical daily routines include the daily interaction with the aforementioned offenders and provision of environmental services throughout complex medical areas and patient housing.

A Custodian (CF) in this setting is also responsible for responding to and performing duties in extremely dangerous situations. These situations include direct contact involving hazardous waste and biohazardous materials to include blood spills (some containing known high rates of communicable diseases) which result due to suicides and/or instances of violence. Other examples include responding to complex terminal cleans of patient rooms that have mentally decompensated offenders resulting in unpredictable behavior to include smearing of feces and other bodily fluids throughout their rooms. Custodians respond to these types of incidents on a daily basis. The California Correctional Health Care Facilities (CHCF) performs over 390 terminal cleans per month and CALPIA performs over 3,330 terminal cleans per month statewide.

This is in addition to the required daily cleaning and sanitization of all licensed areas and rooms. Examples of incidents and duties performed on a daily basis by Custodians working in a health care setting within a correctional environment statewide include cleaning up cells covered with blood due to extreme violence. These are additional cleanings beyond the terminal cleanings listed above. CALPIA has a turnover rate for Custodians of 49%, in part due to workers taking positions both inside and outside of civil service which offer a higher salary and incentives. In order to recruit the most qualified individual and to reach a broad a segment of qualified and skilled professionals, it is necessary to affirm the PIB's authority to authorize a recruitment and ongoing compensation differential to employees.

SPECIFIC PURPOSE AND RATIONALE FOR THE PROPOSED REGULATORY ACTION:

CALPIA is tasked with operating similar to a private business, established for the mission of providing training, skills, and employment to inmates in order to reduce recidivism upon release from incarceration. The PIB has the authority to do all the things that a private board of directors would do such as hiring a CEO who reports to the board of directors and providing recruitment and ongoing incentive compensation to staff. Therefore, this change will better address the desire to reach the most qualified applicants and retain the most qualified candidates.

Without additional recruitment incentives and ongoing incentive compensation, many qualified applicants may not apply, and and CALPIA loses the opportunity to reach the most qualified applicants and retain the most qualified candidates for its workforce. As

CALPIA competes directly with the private sector in its staff recruitments recruitment incentives and ongoing incentive compensation will increase the competitiveness of CALPIA in its executive and staff hiring.

Using recruitment incentives and ongoing incentive compensation also addresses the State Auditor's findings issued in its report regarding the challenges of State agencies with a workforce of approximately 41% within potential reach of retiring, as they are age 50 or older. See State Auditor's Report 2015-608, titled "State Departments Need to Improve Their Workforce and Succession Planning Efforts to Mitigate the Risks of Increasing Retirements." In addition, as of October 2018, California's unemployment rate is at a low of 3.5% making it timely to more competitively recruit staff with recruitment incentives and ongoing incentive compensation.

The proposed regulatory action will be vetted through the public process of PIB, as required in PC Section 2808, subsections (h) and (i), and promulgated through the regulatory process as specified in the Administrative Procedure Act (APA). PIB will review these regulations at the next board meeting. Upon approval, the PIB's Record of Vote and the applicable portion of the meeting minutes will be included in the rulemaking file. These documents will be filed with the Office of Administrative Law (OAL).

In 1982, the California Legislature restructured the Department of Corrections' industries and vocational training program abolishing the Correctional Industries Commission and replacing it with the newly created Prison Industry Authority (PIA) (subsequently renamed CALPIA) under the direction of the Prison Industry Board. The Legislature established the Prison Industry Board as autonomous from the Department of Corrections. In 1982, the new Prison Industry Authority was given independent autonomy.

PC Sections 2801 and 2808 provide PIB with implied rulemaking authority. PIB has implied rulemaking authority because a statute expressly gives a duty or power to a specified state agency but makes no express mention of the authority to adopt rules or regulations. Agencies which have expressly been given a duty or power by statute have implicitly been delegated the authority to adopt those rules and regulations necessary for the due and efficient exercise of a duty or power expressly granted. Government Code Section 11349, subdivision (b), states: *"Authority means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."*

Section 14, subsection (a), of Title 1 of the California Code of Regulations (CCR) provides that rulemaking authority shall be presumed to exist if an agency can cite in its authority a California statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted. Penal Code Section 2808 provides that PIB, in the exercise of its duties, shall have all of the powers and do all of the things that the board of directors of a private corporation would do. As such, Section 2808 grants the

general rulemaking power to the PIB. In addition, Penal Code section 2809 expressly authorizes the use of compensation incentives, and provides that the PIB may: “*recruit and employ civilian staff. . . and shall establish . . . hiring. . . procedures and practices which will meet the unique personnel needs of the authority. The practices may include incentives based on productivity, profit-sharing plans, or other criteria which will encourage civilian employee involvement in the productivity goals of the authority.*”

Proposed Section 8904 is a regulation consistent with the Legislature’s delegation of authority. A court assessing the validity of a regulation will begin by determining whether the regulation conflicts with its enabling statutes, exercising its independent judgment while giving weight to the agency’s interpretation of the statute. *Our Children’s Earth Foundation v. California Air Resources Board* (2015) 234 Cal.App.4th 870, 885-886, review den. June 10, 2015; *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415-416. The court will then address whether the regulation is reasonably necessary to effectuate the statute’s purpose, applying a more deferential test by inquiring whether the action was arbitrary, capricious, or without reasonable or rational basis. *Our Children’s Earth Foundation v. California Air Resources Board* (2015) 234 Cal.App.4th 870, 886, review den. June 10, 2015; *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415. Proposed section 8904 is both consistent with the plain meaning of the statute and reasonable.

When analyzing of legislative intent, due regard must be given to “the object to be achieved and the evil to be prevented by the legislation.” *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, 278 Cal.Rptr. 614, 805 P.2d 873; *City of Long Beach v. California Citizens for Neighborhood Empowerment, et. al.* (2003) 111 Cal.App.4th 302, 3 Cal.Rptr.3d 473. The object to be achieved by the legislation was to provide CALPIA sole and independent authority; to operate and manage operations as a business so that CALPIA could provide jobs for inmate workers. It is an inherent right of a board of directors to control and look to the well-being of the corporation. *In re MRV Communs., Inc.*, No. 08-3800, 2010 U.S. Dist. LEXIS 46946, at 11 (C.D. Cal. May 10, 2010).

PIB functions like a corporate board of directors, with statutorily derived plenary authority to guide CALPIA in its activities. Hiring, operations, contracting, sales and production are based on a private sector model rather than a government model. CALPIA is not part of the state budget. Its revenues come entirely from selling CALPIA products. It does not acquire, hold or disburse any public or state money. While it may borrow money from the State Treasury or from private resources to finance operations, CALPIA does not use any taxpayer money. Fully exercising the complete authority the Legislature granted by allows and enables PIB to adopt best business practices that lower prices, reduce administrative costs, including providing recruitment and retention compensation to employees.

In PC section 2808, the Legislature specified the new operation of the prison industry program, run by PIB, would be freed of government impediment so that it could be self-sustaining and financed from its own operating resources. In PC section 2809, the Legislature specified that the PIB has authority to provide recruitment and retention compensation for employees. The PIB and CALPIA intend to provide incentive compensation as necessary to fulfill its mission in any manner that PIB determines to be commercially reasonable and competitive with procurement systems used by private industry. The proposed regulation is reasonably necessary to effectuate the statute's purpose, and recruit and retain the most qualified staff.

The proposed regulation is facially clear to the directly affected persons because a persona applying for a particular position in a particular geographic location in a particular industry or specialty will know that their skills are in high demand, or that the job is extremely undesirable and the location of the assignment is undesirable. This is particularly so for Custodians in CDCR prisons given the dangerous of the environment, the remoteness of location if numerous prisons, and the difficulty of the work which is basically a forensic crime scene cleaner oftentimes. For other positions, the private sector versus public sector pay scales for positions such as CEO are so far apart as to render that position one that is not able to be filled without incentive compensation, and therefore, is facially clear to the directly affected persons, i.e., applicants qualified for the position of chief executive officer, high level managers potentially with MBAs, finance and law degrees along with law enforcement experience.

Consideration of Alternatives:

The PIB has determined that there are no reasonable alternatives to the proposed regulatory action nor have any reasonable alternatives been brought to the attention of the PIB that would lessen any adverse impact on small business.

ECONOMIC IMPACT ASSESSMENT

As a result of the economic impact assessment and in accordance with Government Code Section 11346.3(b), CALPIA has made the following assessments regarding the proposed regulation: CALPIA is self-supporting from the sale of its products and services and operates from the Prison Industries Revolving Fund without any appropriation from the General Fund. Pursuant to Penal Code Section 2806¹, CALPIA's revolving fund is not subject to annual appropriation by the Legislature or oversight by the Department of Finance. Therefore, the incentives compensation will not affect the California state budget. The implementation of this regulation will add additional necessary CALPIA

¹ Penal Code § 2806 (Deering's 2017).

' . . . Funds deposited in the revolving fund are not subject to annual appropriation by the Legislature and may be used without a time limit by the authority.

The Prison Industries Revolving Fund is not subject to the provisions of Articles 2 (commencing with Section 13320) and 3 (commencing with Section 13335) of Chapter 3 of Part 3 of Division 3 of Title 2 of the Government Code . . . '

operating costs, however, these are for existing authorized positions, and the costs will be paid from CALPIA revenues and not the state budget. For example, CALPIA anticipates the fiscal impact for FY 2018-19 Mid-Year Revise to provide Custodian series staff with pay differentials at \$1.3 million, with one-year costs estimated at \$2.6 million. It will increase employment opportunities for the public. The only economic impact may be the additional income of staff which cannot be determined and is speculative as staff may save these earnings, add them to retirements accounts, or otherwise use them in the state, national, or worldwide economy.

Creation or Elimination of Jobs within the State of California:

The PIB has determined the proposed regulatory action may will no impact on the creation or elimination of existing jobs or businesses within California as the proposed regulation only affects the internal management of the PIB and CALPIA and the employment of inmate workers within CDCR facilities and CALPIA operations. There will be no creation or elimination of jobs within the State of California because the incentives are for existing authorized positions, and the costs will be paid from CALPIA revenues and not the state budget.

Creation of New Businesses or Elimination of Existing Businesses within the State of California:

The PIB has determined that the proposed regulatory action will have no impact on the creation of new or elimination of existing businesses within the State of California as the proposed regulation only affects the internal management of the PIB and CALPIA and the employment of inmate workers within CDCR facilities and CALPIA operations.

Significant Statewide Adverse Economic Impact on Business:

The PIB has determined that the proposed regulatory action will not have any statewide adverse economic impact directly affecting businesses as the proposed regulation only affects the internal management of the PIB and CALPIA and the employment of inmate workers within CDCR facilities and CALPIA operations.

Expansion of Businesses Currently Doing Business within the State of California:

The PIB has evaluated whether businesses would be affected in the State of California. The PIB has made the initial determination this proposed regulatory action will not affect the creation of new business, the expansion of existing businesses, or the elimination of existing businesses as the proposed regulation only affects the internal management of the PIB and CALPIA and the employment of inmate workers within CDCR facilities and CALPIA operations.

Local Mandates:

The PIB has determined that this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Part 7 (Section 17561)

of Division 4 as the proposed regulation only affects the internal management of the PIB and CALPIA.

Benefits of the Regulations

The PIB has evaluated the potential benefits of this proposed regulatory action. The PIB has made a determination that this proposed regulatory action:

- Will have no effect on housing costs.
- Will not impose new mandates upon local agencies or school districts.
- Will involve no nondiscretionary costs or savings to any local agency, no cost to any local agency or school district for which Sections 17500-17630 of the Government Code require reimbursement, nor costs or savings in federal funding to the state.
- Will neither create nor eliminate jobs in the state of California, nor result in the elimination of existing businesses, nor create or expand businesses in the State of California.
- Will continue to provide a nonmonetary benefit for the protection and safety of public health and safety, by ensuring ongoing efficiency of operations employment inmate workers, and providing work experiences for inmate workers to utilize upon release from custody.
- Will allow more effective recruitment and retention of staff to support CALPIA operations.
- Will reduce CALPIA's position vacancy rate and provide additional employment opportunities to the public.
- Staff may save these earnings, add them to retirements accounts, or otherwise use them in the state, national, or worldwide economy.

Reports Relied Upon: None.